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Sex Discrimination - Title IX Applies to Employees

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INTRODUCTION

Section 901(a) of Title IX of the Education Amendments of 1972 provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” Section 902 authorizes each agency awarding federal financial assistance to any education program to promulgate regulations ensuring that aid recipients adhere to § 901(a). Section 902 also provides for termination of federal funds to an institution which does not comply with the regulations. The Department of Health, Education and Welfare (HEW) issued regulations (Subpart E) prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment.

The regulations went into effect in 1975. Since that time several school systems have challenged HEW’s interpretation of “no person,” contending that “person” applies only to students. United States district courts and courts of appeals have disagreed.

2. Title IX, § 902, 20 U.S.C. § 1681 et seq. 34 C.F.R. § 106.71, § 100.6—.11 (1981). These regulations initially appeared at 34 C.F.R. pt. 86, but were recodified.
3. Id.
4. In 1979, HEW’s functions under Title IX were transferred to the Department of Education, but to avoid confusion, HEW will be used throughout this note to refer to both agencies.
5. 34 C.F.R. Part 106, Subpart E (1980). Section 106.51(a)(1) provides: “No person shall, on the basis of sex, . . . be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.”
6. In Dougherty County School Sys. v. Harris, 622 F.2d 735, 738 (5th Cir. 1980) the court indicated that a female employee is discriminated against if she is paid less than a male employee for the same work.
on whether Title IX should be interpreted to prohibit employment
discrimination.  

Two Connecticut school boards brought separate suits chal-
 lenging HEW's authority to issue Subpart E regulations, which
specifically include prohibition of discrimination in employment
under any education program operated by an institution which
receives federal financial assistance. Both district courts granted
summary judgment in favor of the school board, invalidated
HEW's employment regulations, and enjoined HEW from interfer-
ing with the school boards' federal funds because of noncompliance
with those regulations. On appeal, the cases were consolidated.
The Second Circuit Court of Appeals reversed, concluding that Ti-
tle IX was intended to prohibit employment discrimination and
finding the Subpart E regulations consistent with § 902. The Su-
preme Court granted certiorari to resolve the issue. After care-
fully examining the statutory language of Title IX, the legislative
history of the provisions, and postenactment history of the statute,
the Supreme Court concluded, in North Haven Board of Educa-
tion v. Bell, that employment discrimination comes within Title
IX's prohibition and the Subpart E regulations are valid. The deci-
sion in North Haven should settle the issue of whether Title IX
applies to employees.

This note will examine the Court's rationale and the implica-
tions of the North Haven decision.

THE CASE

Two Connecticut public school boards brought separate suits
challenging HEW's authority to issue the Subpart E regulations.
In North Haven, a female tenured teacher in the North Haven public school system filed a complaint with HEW, alleging that the North Haven Board of Education had violated Title IX by refusing to rehire her after a one-year maternity leave. HEW began to investigate the school board's employment practices and requested from the board information concerning its policies on hiring, leaves of absence, and tenure. The North Haven Board asserted that HEW lacked authority to regulate employment practices under Title IX, refused to comply with HEW's request, and brought an action seeking a declaratory judgment that the Subpart E regulations exceeded the authority conferred on HEW by Title IX and seeking an injunction forbidding HEW from attempting to terminate the school district's federal funds. The District Court granted North Haven's motion for summary judgment, invalidated the employment regulations, and permanently enjoined HEW from interfering with North Haven's federal funds because of noncompliance with those regulations.

In Trumbull, a female former guidance counselor in the Trumbull school district filed a complaint with HEW, alleging that the Trumbull Board of Education had discriminated against her on the basis of gender with respect to job assignments, working conditions, and the failure to renew her contract. HEW notified the Trumbull Board that it had violated Title IX and warned that corrective action must be taken. The Trumbull Board then filed suit contending that HEW's Title IX employment regulations were invalid and seeking declaratory and injunctive relief. The District Court granted the board's motion for summary judgment and subsequently amended the judgment, on Trumbull's request, to include injunctive and declaratory relief.

The two cases were consolidated on appeal. The Court of Ap-
peals for the Second Circuit reversed. The court examined the legislative history of § 901 and concluded that the provision was intended to prohibit employment discrimination. The court also found the Subpart E regulations consistent with § 902. The court remanded the cases to the District Court to determine whether petitioners had violated the HEW regulations and, if so, what remedies were appropriate. Because this holding was contrary to that of other federal courts which had invalidated the employment regulations, the United States Supreme Court granted certiorari.

The Supreme Court first examined the statutory language of § 901(a) in an effort to determine whether § 901(a)'s directive that "no person" may be discriminated against on the basis of gender, includes employees as well as students. The Court concluded that employees were included since Title IX did not expressly include or exclude employees. The Court next examined Title IX's legislative history in order to determine whether Congress meant to include employees in § 901. After studying notes from the Senate hearings and debates, in particular statements of Senator Bayh, who introduced the legislation, the Court concluded that Congress meant for employment discrimination to come within the prohibition of Title IX. Finally, the Court examined the postenactment history of Title IX. The Court considered Senator Bayh's statements after the legislation was enacted and studied HEW's procedure in issuing the regulations as well as the public responses to the legislation. The Court also noted that Congress had considered, but refused to pass, bills which would have amended § 901 to prohibit its applicability to employment discrimination. The Court again concluded that Congress meant Title IX to include prohibitions against employment discrimination.

26. 629 F.2d 773 (2d Cir. 1980).
27. Id. at 786.
28. Id. at 785.
30. 102 S. Ct. at 1917.
31. Id. at 1918.
32. Id. at 1922-23.
33. Id. at 1923.
34. Id.
35. Id. at 1925.
36. Id.
Women as a class have been discriminated against throughout history. 37 The women's liberation movement in the late 1960s made the public acutely aware of the extent of this discrimination. Sex discrimination has been rampant in the educational field. 38 In 1970 a special House subcommittee on education held hearings on gender discrimination in education. 39 Much of the testimony focused on discrimination against women in employment; however, the proposal on which the hearings were held never emerged from committee. 40 In 1972, Senator Bayh introduced a provision in the Senate during debate on the Education Amendments of 1972. 41 Senator Bayh’s amendment included provisions prohibiting gender discrimination in federally funded education programs and provisions extending the coverage of Title VII and the Equal Pay Act to educational institutions. 42 Bayh’s amendment was enacted as Title IX. 43

Pursuant to § 902 of Title IX, in 1972, HEW issued proposed regulations prohibiting discrimination on the basis of sex in education-related programs and activities and in education-related employment, recruitment, compensation, and job classification. 44 Specifically, Subpart E prohibited discriminatory employment practices in federally funded education programs. 45 A one-year comment period was allowed during which nearly 10,000 formal responses were submitted. 46 In June, 1975, HEW published its first Title IX regulations and submitted them to Congress for review. 47

37. See Bayh, The ERA, 6 Ind. L. Rev. 1 (1972).
39. Id.
40. See 102 S. Ct. at 1919 n.13.
41. 102 S. Ct. at 1919.
42. Id.
43. Id.
44. 45 C.F.R. § 86.51—.61 (1975), now reissued in 34 C.F.R. § 106.51—.61 (1981).
45. Id.
46. 102 S. Ct. at 1923.
47. 40 Fed. Reg. 24,128 (1975). Section 431(d)(1) of the General Education Provisions Act, 20 U.S.C. § 1232(d)(1) requires submission of the regulations to Congress for review, to afford Congress an opportunity to examine the regulations and disapprove them if found to be inconsistent with the Act from which they derive their authority.
While other portions of Title IX were amended, the Subpart E regulations were left undisturbed. Senator Helms did introduce a bill that in essence stated that § 901 would not apply to employees; however, no action was taken on the bill.

HEW’s regulations sparked controversy and litigation. Much of the controversy centered on the wording of § 901(a), which provides that “no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” The issue was whether these regulations exceeded statutory authority. Four United States courts of appeals held that HEW does not have the authority under Title IX to regulate employment practices. The first of these cases, Islesboro School Committee v. Califano, declared invalid an HEW regulation which required employers to pay disability benefits to employees on pregnancy leave. The Court reasoned that the “plain language” of § 901 did not encompass employees. Romeo Community School v. HEW, decided shortly after Islesboro, held that the words “no person” in § 901 are limited by the later language of the statute and concluded that § 901 covers only persons discriminated against “under any education program or activity receiving Federal financial assistance.” In support of its conclusion, the Romeo court noted that other federal statutes were designed to deal with employment discrimination, and, therefore, Congress did not intend to create an additional remedy in Title

48. 102 S. Ct. at 1925.
49. 629 F.2d at 784.
52. 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).
53. 45 C.F.R. § 86.57(c) (1980).
54. 593 F.2d at 426.
56. Id. at 584 (quoting § 901, 20 U.S.C. § 1681 (1976)). The later language is “persons discriminated against ‘under any education program or activity receiving Federal financial assistance.’ ”
57. 600 F.2d at 584.
IX. The courts in *Junior College District v. Califano,* and *Seattle University v. HEW* relied heavily on the *Islesboro* and *Romeo* decisions, simply stating that they agreed with the conclusions of the above courts.

In 1980, the Second Circuit Court of Appeals, in *North Haven Board of Education v. Hufstedler,* became the first circuit court to hold the disputed regulations valid. The court thoroughly examined the statute and its legislative history and concluded that "Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimination in employment . . . ." The plaintiff school board appealed and the United States Supreme Court granted certiorari to resolve the controversy.

**ANALYSIS**

*North Haven* held that employment discrimination does come within Title IX's prohibition and further held the Subpart E regulations valid. In an opinion by Justice Blackmun, the Court began its analysis by examining the statutory language of Title IX. The Court broadly interpreted § 901(a)'s directive that "no person" may be discriminated against on the basis of gender, concluding that employees as well as students are included. The majority indicated that a female employee who works in a federally funded program is "subjected to discrimination under" that program if she is paid less than a male employee for the same work or given less opportunity for promotion. Since the section neither expressly nor impliedly excludes employees, the Court interpreted § 901(a) as covering and protecting employees. Arguing that § 901(a) was

59. 600 F.2d at 584.
60. 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979).
61. 621 F.2d 992 (9th Cir.), cert. granted sub nom., 449 U.S. 1009 (1980).
62. 597 F.2d at 121; 621 F.2d at 994.
Note that the defendant in this case is the Secretary of HEW. The Secretary changed during this time, thus, the reason for different named defendants.
64. 629 F.2d at 785.
66. 102 S. Ct. 1912.
67. *Id.* at 1917-18.
68. *Id.* at 1917. See Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980), cert. pending sub nom., Bell v. Dougherty County School Sys., No. 80-1023.
69. 102 S. Ct. at 1918.
meant only to cover students, petitioners pointed out that the nine exceptions listed in § 901(a) are directed only to students. The Court countered by noting that two of the nine exceptions were not concerned solely with students, but in fact, omitted a class of institutions.

In a dissent by Justice Powell, the minority of three accused the majority of paraphrasing the language and thereby misreading the statute. The dissent argued that "[i]t tortures the language chosen by Congress to conclude that . . . teachers . . . who are discriminated against on the basis of sex in employment are thereby (i) denied participation in a program or activity; (ii) denied the benefits of a program or activity; or (iii) subject to discrimination under an education program or activity." The dissent also discounted the majority's strong reliance on the negative inference drawn from the fact that § 901 does not expressly exclude employees. Neither of the arguments set forth by the dissent are very persuasive for the following reasons. First, since "person" is not defined, it should be given its ordinary meaning. Second, the absence of a specific exclusion for employees among the list of exceptions tends to indicate that Title IX's protection extends to employees of educational institutions. Finally, there is no indication from the plain meaning of the Title IX language that employment discrimination is not included in the statute.

After concluding its examination of the statutory language, the Court examined the legislative history of Title IX, relying heavily

70. Id. Specific exceptions are made for: the admissions policies of schools that begin admitting students of both sexes for the first time, § 901(a)(2); religious schools, § 901(a)(3); military schools, § 901(a)(4); the admissions policies of public institutions of undergraduate higher education that traditionally and continually have admitted students of only one gender, § 901(a)(5); social fraternities and sororities, and voluntary youth service organizations, § 901(a)(6); Boys/Girls State/Nation conferences, § 901(a)(7); father-son and mother-daughter activities at educational institutions, § 901(a)(8); and scholarships awarded in "beauty" pageants by institutions of higher education, § 901(a)(9).

71. Section 901(a)(2) exempts religious schools and § 901(a)(3) exempts military schools.

72. 102 S. Ct. at 1928.

73. Id.

74. Id. at 1930.

75. Id. at 1918 n.10.

76. Id. at 1918.

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on statements made by the sponsor of the bill, Senator Bayh. In a
description of § 901(a), Senator Bayh stated that "[t]he amend-
ment would cover such crucial aspects as admission procedures,
scholarship, and faculty employment . . . ." During a Senate de-
bate, Senator Pell asked about the scope of the amendment; Sena-
tor Bayh replied, "We are dealing with discrimination in admission
to an institution, discrimination of available services or studies
within an institution once students are admitted, and discrimina-
tion in employment within an institution, as a member of a faculty
or whatever." Senator Bayh's statements indicate that he in-
tended employees to be protected under the statute, and the views
of the sponsor of legislation are entitled to significant weight.

The original House amendment had excluded employment,
but the Conference Committee noted in its report that since the
Senate amendment did not exclude employees, the House would
recede. The majority concluded that this conscious omission sug-
gests that Congress intended § 901 to prohibit sex discrimination
in employment.

Petitioners argued that a specific exclusion for employment
was unnecessary since Title IX was patterned after Title VI of the
Civil Rights Act of 1964, a statute limited in its scope to discrimi-
nation against beneficiaries of federally funded programs, not gen-
eral employment practices of fund recipients. The majority indi-
cated that petitioners' and the dissent's reliance on the history of
Title VI was misplaced and reiterated that if Congress had in-
tended that Title IX be parallel to Title VI, it would have enacted
counterparts to Title VI's exclusion of employment. The major-
ity's approach appears to be more sound, since Congress could eas-
ily have drafted an employment exclusion if it had not intended
for employees to be included.

78. 102 S. Ct. at 1919; 118 Cong. Rec. 5803 (1972).
79. 118 Cong. Rec. at 5812.
80. Because the sponsor of a bill should be well informed about the bill's
purpose and intended effect, courts give substantial weight to the sponsor's inter-
pretations. See, e.g., U.S. v. Oates, 560 F.2d 45, 69 n.255 (2d Cir. 1977) ("It is, of
course, well-established that the sponsor's interpretation of his proposal, when
expressed prior to adoption of the legislation, is entitled to great weight").
82. 102 S. Ct. at 1921.
83. Id. at 1922.
85. 102 S. Ct. at 1922.
The Court concluded its analysis by examining the post-enactment history of Title IX. Shortly after Title IX was passed, Senator Bayh published a summary of the bill in the *Congressional Record.* In this description, Senator Bayh stated that while Title VI excludes employment from coverage, "[t]here is no similar exception for employment in the sex discrimination provisions relating to federally assisted education programs." Between the time HEW published the proposed Title IX regulations and the final regulations, HEW received nearly 10,000 comments from the public. The Court pointed out that not one comment "suggested that § 901 was not meant to prohibit discriminatory employment practices." After HEW published its final Title IX regulations in June, 1975, Congress had 45 days for review. In both the Senate and the House, bills were introduced to exclude employment from Title IX, but neither bill was passed. The majority concluded that the postenactment history lends credence to the interpretation that Congress intended to bar employment discrimination in federally financed education programs.

The Court agreed with the analysis of the Second Circuit. While four other courts of appeals had examined the statutory language and legislative history of Title IX, they had not thoroughly examined Senator Bayh's remarks. And, as mentioned before, two of the courts did not examine the statutory language and history at all, merely relying on the first two decisions. The Second Cir-

88. 102 S. Ct. at 1923.
89. Id.
90. Id. at 1924. Representatives Quie and Erlenborn introduced an amendment to H.R. Con. Res. 330 that sought to disapprove the employment regulations as inconsistent with Title IX. Senator Helms introduced a bill that would have provided that nothing in § 901 would apply to employees of educational institutions (S. 2146, 94th Cong., 1st Sess., § 2(1) (1975)).
91. 102 S. Ct. at 1925. The Court noted that although postenactment developments should not be accorded the weight of legislative history, where an agency's statutory construction has been brought to the attention of the public and Congress and the latter has not sought to alter that interpretation, presumably the legislative intent has been correctly discerned.
93. 597 F.2d at 121; 621 F.2d at 994.
Sex Discrimination was the first court to comprehensively examine legislative history and reach a sound decision.

The dissent argued that since Title VII and the Equal Pay Act provided prohibitions of employment discrimination in educational institutions on the basis of sex, Congress would hardly have enacted another statute addressing the same problem. In addressing this issue, the majority, concluding that Congress could have intended to create an additional overlapping remedy for employment discrimination, stated that "this court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping to eradicate employee discrimination." Moreover, Title IX is more comprehensive in scope than the Equal Pay Act and provides a more potent remedy—fund termination to the institution—than Title VII, when there are no money damages involved. The fund termination remedy is especially effective in cases of sex discrimination on a large scale, thus, Title IX provides a useful remedy to correct instances of institution-wide discrimination.

In Cannon v. University of Chicago, the Supreme Court recognized a private right to sue under Title IX. North Haven's result now gives teachers and administrators a private cause of action to insure that they will have a suitable remedy when discriminated against by educational institutions receiving federal funds.

The North Haven decision will undoubtedly mean that cases with contrary decisions, such as Department of Education v. Seattle University, will be sent back to the appeals courts for reconsideration. The decision ends controversy over whether employees are protected under Title IX and whether the Subpart E regulations are valid and consistent with Title IX's program-specificity.

While the aforementioned portions of the decision would appear to be a total victory for female employees of educational institutions, the Court further held that an agency's authority under Title IX to promulgate regulations and terminate funds is subject

94. 102 S. Ct. at 1933.
95. Id. at 1925, n.26.
97. See Note, Regulations under Title IX Prohibiting Sex Discrimination in Education-Related Employment Held Valid, 56 N. D. Lawyer 528, 532 (1981).
to the program-specific limitation of § 901 and § 902.\textsuperscript{100} The Second Circuit indicated that under § 902, termination of funds should be limited in its effect to the particular program in which noncompliance is found, but implied that HEW’s authority to issue regulations was broader.\textsuperscript{101} Thus, while the Supreme Court upheld the HEW regulations, the decision also indicated that the regulations must be limited to programs or activities that receive federal aid.\textsuperscript{102} Consistent with this holding, if an employee is not a participant in a federal grant program or her salary is not paid from federal funds, she does not come under Title IX protection. The Court remanded \textit{North Haven} for a determination of whether petitioners’ employment practices actually discriminated on the basis of gender and, if so, whether such discrimination comes within the prohibition of Title IX.\textsuperscript{103}

While the Court concluded that “an agency’s authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902,”\textsuperscript{104} the Court did not undertake to define “program.”\textsuperscript{105} Although “program” has not been specifically defined, when the word “program” is used in other places within Title 20, it usually refers to a particular program, such as vocational guidance or remedial instruction.\textsuperscript{106} In a case dealing with racial discrimination under Title VI, the Fifth Circuit emphasized that the phrase “program or activity” did not include the “collectivization of all school subventions under the single rubric, ‘program or part thereof.’”\textsuperscript{107}

Another question left unanswered by the court is what types of aid would be considered “federal financial assistance.” While there are no decisions on this point, the Education Department has

\textsuperscript{100} 102 S. Ct. at 1926. Section 902 provides that each Federal agency empowered to extend Federal financial assistance to any education program or activity is authorized to effectuate the provisions of § 901 with respect to such program or activity.

\textsuperscript{101} 629 F.2d at 785-86.

\textsuperscript{102} 102 S. Ct. at 1926.

\textsuperscript{103} Id. at 1927.

\textsuperscript{104} Id. at 1926.

\textsuperscript{105} Id. at 1927.


\textsuperscript{107} Bd. of Public Instruction v. Finch, 414 F.2d 1068, 1077 (5th Cir. 1969). See Note, 56 N.D. Lawyer 528, at 535 for a discussion on the meaning of “program.”
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proposed to exclude from "federal financial assistance" federal dollars received by an institution's students.\(^{108}\)

CONCLUSION

*North Haven* upheld HEW's regulations (Subpart E) which prohibit employment discrimination on the basis of sex in federally funded education programs.\(^{109}\) From an examination of the statutory language and legislative history of Title IX, the Supreme Court concluded that employment discrimination does come within Title IX's prohibition.\(^{110}\) Contrary decisions from the various district courts and courts of appeals will need to be reconciled. In addition, the dozens of complaints filed with the Office of Civil Rights which have been delayed pending *North Haven* can now be settled.

While *North Haven* signals a victory for female employees in educational institutions, the issue is not yet totally resolved. This victory could be an empty one if other Title IX issues are not favorably settled. In fact, the Supreme Court's holding that an agency's authority under Title IX to terminate funds is subject to the program-specific limitation,\(^{111}\) limits employees protected by Title IX to those employees in programs receiving federal assistance.

The answers to two as of yet unanswered questions—what is a "program or activity" and what type of aid is considered "federal financial assistance"—are the key to the Title IX controversy. For even though Title IX regulations protect employees, if the program-specific limitation is construed too narrowly, few female employees will be protected. In the typical school, only a few employees are paid out of federal funds and this number will likely further diminish with recent cuts in federal funds. In addition, if money received by an institution's students is excluded from the scope of "federal financial assistance," the bulk of federal dollars received by institutions of higher education will be outside the reach of the Title IX regulations. Thus, the answers to these two questions can either expand the number of employees protected under Title IX or diminish the number to a small, privileged few.

\(^{108}\) See Supreme Court Rules Title IX Bars Sex Bias Against College Workers as well as Students, 24 CHRONICLE OF HIGHER EDUC. No. 13, at 1 (1982).
\(^{109}\) 102 S. Ct. 1912.
\(^{110}\) Id.
\(^{111}\) Id. at 1926.
Analysis of the language of Title IX and its legislative history reveals that Congress intended Title IX to prohibit employment discrimination. While strides have been made to reduce sex discrimination in education, discrimination is still prevalent. Even though the Equal Pay Act\textsuperscript{112} and Title VII\textsuperscript{113} afford women some protection, Title IX's added protection serves to reinforce previous legislation and offers female employees alternative remedies. "Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimination in employment rather than rely solely on the important, but usually piecemeal, sanctions available to aggrieved employees under Title VII and the Equal Pay Act."\textsuperscript{114}

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\item 112. 29 U.S.C. § 213(a) (1976).
\item 114. 629 F.2d at 785.
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